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State v. Lopez Appellant's Brief Dckt. 45072

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 45072
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-16-29915
v.)	
)	
JEREMY JOHN LOPEZ,)	APPELLANT’S BRIEF
)	
Defendant-Appellant.)	
_____)	

STATEMENT OF THE CASE

Nature of the Case

Jeremy John Lopez appeals from the district court’s order denying his motion pursuant to Idaho Criminal Rule 35 (“Rule 35”) for a reduction of sentence. He contends the district court abused its discretion when it sentenced him to a unified term of eight years, with two years fixed, for grand theft by possession of stolen property. He also contends the district court abused its discretion when it denied his Rule 35 motion in light of the additional information he submitted to the court regarding the strong potential for him to lose his parental rights to his youngest child while incarcerated.

Statement of Facts & Course of Proceedings

Mr. Lopez was found to be in possession of a stolen vehicle. (Presentence Investigation Report (“PSI”), p.3.) He was charged by Information with grand theft by possession of stolen property. (R., pp.37-38.) Mr. Lopez entered into a plea agreement with the State pursuant to which he agreed to plead guilty, and the State agreed to dismiss another felony case, not file an Information Part II, and recommend a unified sentence of ten years, with three years fixed. (12/7/16 Tr., p.1, L.12 – p.2, L.7; R., pp.61-67.) The district court accepted Mr. Lopez’s guilty plea. (12/7/16 Tr., p.16, Ls.15-18.)

The district court sentenced Mr. Lopez to a unified term of eight years, with two years fixed. (2/15/17 Tr., p.18, Ls.13-17.) The judgment of conviction was filed on February 17, 2017. (R., pp.71-74.) Mr. Lopez filed a Rule 35 motion for a reduction of sentence on February 28, 2017. (R., pp.75-84.) Following a hearing, the district court issued a memorandum decision and order denying Mr. Lopez’s Rule 35 motion on April 28, 2017. (R., pp.88-91.) Mr. Lopez filed a timely notice of appeal on May 1, 2017. (R., pp.92-94.)

ISSUES

- I. Did the district court abuse its discretion when it sentenced Mr. Lopez to a unified term of eight years, with two years fixed?
- II. Did the district court abuse its discretion when it denied Mr. Lopez’s Rule 35 motion?

ARGUMENT

I.

The District Court Abused Its Discretion When It Sentenced Mr. Lopez To A Unified Term Of Eight Years, With Two Years Fixed

Mr. Lopez asserts that, given any view of the facts, his unified sentence of eight years, with two years fixed, was excessive. Where, as here, the sentence imposed by the district court is within statutory limits, “the appellant bears the burden of demonstrating that it is a clear abuse of discretion.” *State v. Miller*, 151 Idaho 828, 834 (2011) (quoting *State v. Windom*, 150 Idaho 873, 875 (2011)). “When a trial court exercises its discretion in sentencing, ‘the most fundamental requirement is reasonableness.’” *Id.* (quoting *State v. Hooper*, 119 Idaho 606, 608 (1991)). “A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution.” *Id.* (citation omitted). “When reviewing the reasonableness of a sentence this Court will make an independent examination of the record, ‘having regard to the nature of the offense, the character of the offender and the protection of the public interest.’” *Id.* (quoting *State v. Shideler*, 103 Idaho 593, 594 (1982)).

The sentence imposed upon Mr. Lopez was not reasonable considering, most importantly, the nature of his offense. Mr. Lopez was convicted of grand theft by possession of stolen property, after he was found to be possession of a vehicle that had been stolen from an older woman, who had left the car running outside of her garage while packing for a trip with her elderly mother. (PSI, p.3.) The victim is incredibly sympathetic, and the circumstances of the theft are disheartening. (PSI, p.3.) But Mr. Lopez did not steal the car, and there is no indication he was involved in planning the car theft, or knew anything about the theft until long after it had

occurred. At the change of plea hearing, Mr. Lopez described the circumstances of his offense as follows:

My car broke down so a friend of mine came over, and I asked if I could use the car he was driving. And he told me that they had no license plates on it, so I assumed right then that something was shifty with it. So I took the license plates and put them on the car and I took my stuff up to his house.

(12/7/16 Tr., p.14, Ls.10-17.) Mr. Lopez testified he had the stolen vehicle for “[a]bout an hour” and intended to return it to his friend “in a couple hours.” (12/7/16 Tr., p.14, Ls.22-23, p.15, Ls.12-15.) Mr. Lopez apologized to the district court and the victim at sentencing, stating he never intended for anything to be taken from her. (2/15/17 Tr., p.13, Ls.4-8.) While Mr. Lopez suspected there was “something . . . shifty” about the vehicle, his crime of borrowing a stolen car from his friend did not warrant a term of incarceration.

Mr. Lopez’s sentence was also not justified by his character or a need to protect the public interest. Mr. Lopez earned his GED from Boise State University and had been employed as a laborer prior to the instant offense. (PSI, pp.16-17.) Mr. Lopez was, by all accounts, a loving and committed father. The foster parent of his youngest daughter submitted to the district court a very positive letter attesting to Mr. Lopez’s character and requesting a lenient sentence. (PSI, pp.241-42.) Counsel for Mr. Lopez told the district court Mr. Lopez’s “primary focus and goal has been . . . his children.” (2/15/17 Tr., p.11, Ls.6-8.) Mr. Lopez has a lengthy criminal history, and has struggled with drug addiction, but neither his criminal history nor his substance abuse warrant the sentence imposed. (PSI, pp.12-13, 31.)

The presentence investigator stated Mr. Lopez “may benefit from participation in Drug Court, as he may gain the life skills and support resources to assist him in maintaining his sobriety and expanding his positive support system.” (PSI, pp.22-23.) Mr. Lopez asked the district court to place him in drug court and said, “I won’t let you down.” (2/15/17 Tr., p.14,

Ls.7-8.) The presentence investigator stated if the district court found that drug court was not appropriate, Mr. Lopez “may be a viable candidate for an order of retained jurisdiction.” (PSI, p.23.) The district court did not place Mr. Lopez on probation or retain jurisdiction, despite the presentence investigator’s recommendation, but instead imposed a lengthy term of incarceration.

In light of the mitigating factors that exist in this case, and notwithstanding the aggravating factors, the district court abused its discretion when it sentenced Mr. Lopez to a unified term of eight years, with two years fixed.

II.

The District Court Abused Its Discretion When It Denied Mr. Lopez’s Rule 35 Motion

“A motion to alter an otherwise lawful sentence under Rule 35 is addressed to the sound discretion of the sentencing court . . . and essentially is a plea for leniency which may be granted if the sentence originally imposed was unduly severe.” *State v. Trent*, 125 Idaho 251, 253 (Ct. App. 1994). “The denial of a motion for modification of a sentence will not be disturbed absent a showing that the court abused its discretion.” *Id.* In examining a district court’s denial of a motion for modification, this Court “examine[s] the probable duration of confinement in light of the nature of the crime, the character of the offender and the objectives of sentencing, which are the protection of society, deterrence, rehabilitation and retribution.” *Id.* “If the sentence was not excessive when pronounced, the defendant must later show that it is excessive in view of new or additional information presented with the motion for reduction.” *Id.*

The district court abused its discretion when it denied Mr. Lopez’s Rule 35 motion because Mr. Lopez provided additional information to the district court regarding the strong potential for him to lose his parental rights to his youngest child while incarcerated. In support of his Rule 35 motion, Mr. Lopez told the district court his three-year-old daughter, J.B., was

going to be put up for adoption if he was not released. (R., pp.76-82, PSI, p.16.) At the hearing on his Rule 35 motion, Mr. Lopez called Karen Allen, a social worker with the State of Idaho who had worked with Mr. Lopez for two years. (4/26/17 Tr., p.6, L.14 – p.7, L.25.) Ms. Allen testified Mr. Lopez had made great progress on reuniting with his daughter, and his daughter was living with him on an “extended home visit” prior to his incarceration on the instant offense. (4/26/17 Tr., p.9, L.17 – p.10, L.18.) She testified Mr. Lopez was a “very present parent” and stated he and his kids “just melt into each other.” (4/26/17 Tr., p.11, Ls.5-13.) Ms. Allen was asked what would happen if Mr. Lopez remains in custody for two years, and she answered, “[W]e are actually going to have to petition to terminate his parental rights.” (4/26/17 Tr., p.11, L.24 – p.12, L.2.)

In light of the strong, demonstrated potential for Mr. Lopez to lose custody of his youngest child, counsel for Mr. Lopez asked the district court to either suspend Mr. Lopez’s sentence and place him on probation, or reduce the fixed portion of his sentence “so that he can get out and be reunified with his daughter.” (4/26/17 Tr., p.16, Ls.9-12.) The district court judge, notably not the same judge who presided over Mr. Lopez’s sentencing, denied Mr. Lopez’s motion in a brief written decision, stating simply that there was insufficient evidence to support a finding that the sentence was unduly severe when originally imposed. (R., pp.89-90.) On the evidence presented, this decision represents an abuse of discretion. The sentence imposed on Mr. Lopez is not warranted by the statutory sentencing factors, and will most likely result in Mr. Lopez losing parental rights to his youngest child, to whom he is a committed and loving father, during his term of incarceration.

CONCLUSION

Mr. Lopez respectfully requests that this Court either reduce his sentence as it deems appropriate, or vacate his sentence and remand this case to the district court for a new sentencing hearing. Alternatively, he requests that this Court vacate the district court's order denying his Rule 35 motion and remand this case to the district court with instructions to suspend his sentence and place him on probation, or reduce the fixed portion of his sentence.

DATED this 2nd day of October, 2017.

_____/s/_____
ANDREA W. REYNOLDS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of October, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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INMATE #52286
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PATRICK H OWEN
DISTRICT COURT JUDGE
E-MAILED BRIEF

NICOLE OWENS
ADA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
E-MAILED BRIEF

_____/s/_____
EVAN A. SMITH
Administrative Assistant

AWR/eas